

obligations. Moreover, where the cable operator is willing to allow the DBS provider to obtain the PEG access channel feeds, then the DBS provider should be required to reimburse the cable operator for a *pro rata* portion of the costs directly related to supporting PEG access, including costs of PEG access services, facilities and equipment.¹¹⁶ This requirement would help bring DBS providers onto the same playing field now occupied by cable operators and OVS operators.

III. SECTION 335 GIVES THE COMMISSION JURISDICTION OVER "DBS PROVIDERS," I.E., THE ENTITIES WHICH SELECT, PACKAGE AND MARKET DBS SERVICE TO THE PUBLIC OVER DBS SATELLITES, EVEN IF UNAFFILIATED WITH THE LICENSEE.

Section 335 of the Communications Act requires the Commission to recognize for regulatory purposes that DBS "service" is provided by the entity responsible for the selection, packaging and marketing of the actual DBS program service delivered to consumers under Part 100 of the Commission's rules, not just the licensee responsible for the technical operation of the Part 100 DBS satellite. The obligations imposed by Section 335 do not refer to the DBS "licensee." On the contrary, Section 335(a) requires the Commission to impose, "on providers of direct broadcast satellite service," public interest or other requirements "for providing video programming."¹¹⁷ Likewise, the 4-7 percent channel set-aside for noncommercial programming in Section 335(b) is to be applied to the "provider" of DBS service.¹¹⁸

¹¹⁶47 C.F.R. § 76.1505(d)(1).

¹¹⁷47 U.S.C. § 335(a) (emphasis added).

¹¹⁸47 U.S.C. § 335(b).

The term "provider of direct broadcast satellite service" is not specifically defined for purposes of Section 335(a). While the definition applicable to the Section 335(b) channel set-aside by its terms only refers to Part 100 licensees and to distributors controlling a minimum number of channels using a Part 25 Ku-band fixed service satellite system for the provision of video programming directly to the home,¹¹⁹ it is clear from the legislative history that Congress understood and anticipated that the DBS provider might not necessarily be the DBS licensee. Rather, the legislative history indicates that the set-aside requirements therein

are intended to apply only to direct broadcast satellite providers, which the Commission shall interpret to mean a person that uses the facilities of a direct broadcast satellite system to provide point-to-multipoint video programming for direct reception by consumers in their homes. The Committee does not intend that the licensed operator of the DBS satellite itself be subject to the requirements of this subsection unless it seeks to provide video programming directly.¹²⁰

Accordingly, in enacting Section 335, Congress recognized that a DBS "provider" is the entity who actually provides DBS service over DBS satellites, *i.e.*, the entity responsible for selecting, packaging and marketing multiple channels of video service delivered over DBS facilities. Thus, Congress drafted the requirements in Sections 335(a) and (b) to specifically apply to such "providers," rather than mere licensees.

Moreover, at the time that Section 335 was enacted, no full-power DBS services licensed under Part 100 of the Commission's rules were operational. The fact that the Section 335(b)(5)(A)(i) statutory definition of "provider of direct broadcast satellite service" refers only to Part 100 licensees is simply an historical anomaly. As a practical matter,

¹¹⁹47 U.S.C. § 335(b)(5)(A).

¹²⁰H.R. Rep. No. 628, 102d Cong., 2d Sess. 124 (1992) (emphasis added).

however, the statutory public interest obligations concern programming, not technical matters, and thus must be imposed on the entity responsible for selecting and packaging the DBS programming in order to be effective. Indeed, the Commission has recognized that, in practice, "a Part 100 licensee as a practical matter might be forced to delegate the day-to-day functions of implementing these [Section 335] requirements to the entity that is actually controlling the distribution of programming by satellite to home viewers."¹²¹ Thus, the Commission recognizes that it is the entity actually distributing DBS programming directly to subscribers which is in the best position to ensure that the public interest and channel set-aside requirements mandated by Section 335 are met. Of course, the Commission might reasonably conclude that its ability to enforce compliance with various public interest obligations would be enhanced by imposing joint responsibility on the DBS licensee and any unaffiliated DBS provider using that DBS licensee's satellite to provide DBS programming directly to subscribers. But in no event should a DBS provider escape responsibility merely because it leases capacity from a DBS licensee without holding an attributable interest in such licensee.¹²²

¹²¹DBS Public Interest NPRM, *supra*, at ¶ 8 (emphasis added).

¹²²Time Warner Cable notes again that the term "provider of direct broadcast satellite service" is not specifically defined for purposes of Section 335(a), but rather, is defined only for purposes of Section 335(b). While Time Warner Cable believes that the Section 335 requirements apply to all Part 100 DBS service providers, should the Commission determine that it is constrained by the statutory language to apply the Section 335(b) channel set-asides only to Part 100 DBS licensees, certainly the Commission is not similarly constrained with respect to the applicability of the Section 335(a) public interest requirements to Part 100 DBS programming providers. Indeed, while the Section 335(b) channel set-asides constitute a technical requirement which Part 100 DBS licensees could easily accomplish, only the actual Part 100 DBS service providers are in a position to directly comply with the Section 335(a) public interest requirements, which relate to the program content offered by such programming providers.

In its ongoing closed captioning proceeding, for example, the Commission has recognized that "the direct link between consumers and their video providers is an important consideration for ensuring compliance with our rules."¹²³ Accordingly, the Commission has tentatively determined that the responsibility for compliance with the Commission's closed captioning requirements should be placed on "video programming providers," defined by the Commission as "all entities who provide video programming directly to a customer's home, regardless of the distribution technologies employed by such entities."¹²⁴ The Commission specifically stated that the closed captioning provisions will apply to DBS services.¹²⁵ The Commission's understanding of what it means to be a "provider" of DBS services cannot logically mean one thing for purposes of the closed captioning requirements and yet mean another for purposes of Section 335 public interest obligations. A DBS "provider," for all regulatory purposes and in the Commission's own words, encompasses "all entities who provide video programming directly to a customer's home." Accordingly, to the extent that a Part 100 DBS licensee is not the actual provider of DBS service directly to consumers, Section 335 should apply to the entity responsible for the selection, packaging and marketing of the programming delivered via the DBS facility -- the true DBS service "provider."

¹²³Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, 12 FCC Rcd 1044 (1997) at ¶ 28.

¹²⁴Id.

¹²⁵Id. at ¶ 5.

Similarly, in extending its cable equal employment opportunity ("EEO") requirements to other MVPDs, the Commission defined an MVPD as

an entity such as, but not limited to, a . . . direct broadcast satellite service . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming, whether or not a licensee. Multichannel video programming distributors do not include an entity which lacks control over the video programming distributed. For purposes of this subpart, an entity has control over the video programming it distributes, if it selects video programming channels or programs and determines how they are presented for sale to consumers.¹²⁶

Thus, for EEO purposes as well, the Commission has recognized that a retailer of DBS programming should not escape public interest obligations.

In any event, if the Commission concludes that responsibility for compliance with any additional public interest and other obligations should be imposed only on Part 100 DBS licensees, then the obligations mandated by Section 335 should clearly apply to any DBS program packager that is affiliated with the Part 100 licensee of the satellite it utilizes to provide service. The Commission clearly cannot allow a Part 100 DBS licensee to evade any statutory obligations through the artifice of establishing an affiliated entity which leases substantial amounts of the DBS capacity and then claiming that such affiliated entity is exempt. For purposes of determining when such affiliation exists, the Commission should employ the same broad definition of "attributable interest" contained in the Commission's cable program access rules.¹²⁷ For example, a DBS licensee and a DBS service provider should be deemed "affiliated" for purposes of Section 335 where the two entities share any

¹²⁶47 C.F.R. § 76.71(a) (emphasis added).

¹²⁷See 47 C.F.R. § 76.1000(b).

common officers or directors or where either entity holds a 5 percent or greater voting, non-voting, or limited partnership equity interest in the other entity. As is true of the "attributable interest" definition applicable for purposes of the cable program access rules, there should be no single majority shareholder or limited partner insulation exemptions.¹²⁸

IV. CONCLUSION.

From the foregoing discussion, it is apparent that cable television operators are subject to a daunting array of very real and substantial public interest obligations. Moreover, the list set forth above is by no means exhaustive, but rather focuses on those obligations with a federal nexus either in the Communications Act or the Commission's rules. A plethora of additional public interest obligations are typically imposed on cable operators in the local franchising process. Such obligations might include universal service requirements, channel capacity, system design and architecture, reporting obligations, wiring of schools and other public buildings, and franchise fees,¹²⁹ to name but a few. Significantly, the public interest obligations imposed on cable operators are unambiguous, quantifiable and readily ascertainable, in stark contrast to the illusory public interest obligations allegedly imposed on broadcasters in return for their free use of public spectrum.

If allowed to retransmit local broadcast signals, DBS providers boast that they should be thought of as "a highly cost-effective and functionally superior wireless overbuild of the entire American cable industry."¹³⁰ Of course, such a scheme can indeed be "highly cost-

¹²⁸Id.

¹²⁹For example, Time Warner Cable paid in excess of \$169 million in franchise fees in 1996.

¹³⁰Remarks of Preston Padden, Feb. 24, 1997, Los Angeles, CA at 1.

effective" if it is allowed to compete on an unlevel playing field by escaping parity of public interest obligations compared to those imposed on cable systems. In order to fulfill its mandate under Section 335 of the Communications Act, and to advance the cause of full and fair competition, the Commission should either relieve cable television operators from any public interest obligations not imposed on DBS providers, or the Commission should impose comparable public interest obligations on DBS providers. Moreover, the Commission must impose additional public interest obligations, such as must-carry, non-dup, syndex and sports blackout requirements, on any DBS provider electing to retransmit local broadcast stations. Finally, to advance the goal of localism, the Commission should impose PEG access support obligations, analogous to those incurred by cable operators, on DBS providers which retransmit local broadcast signals.

Respectfully submitted,

TIME WARNER CABLE

A handwritten signature in black ink, appearing to read "Aaron I. Fleischman", with a long horizontal flourish extending to the right.

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